

2011 WL 8154410 (Kan.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)
District Court of Kansas.
Shawnee County

Edwin S. DANA Sr. and Douglas E. Dana, Plaintiffs,
v.
NEWCOMER FUNERAL SERVICE GROUP, INC. et al., Defendants.

No. 10CV001638.
June 6, 2011.

Division No. 7

Memorandum in Support of Plaintiffs' Motion to Assert a Claim for Punitive Damages

Hentzen Law Firm, a Professional Corporation, [Paul K. Hentzen](#) KS # 20717, Polly S. Bartle KS #20912, 11551 Granada, Ste 100, Leawood, KS 66211, Ph: (913) 451-7900, Fax: (913) 451-7902, paul@hentzenlaw.com, Attorneys for Plaintiffs.

COME NOW plaintiffs, Edwin S. Dana, Sr. and Douglas E. Dana, and submit the following suggestions in support of their motion to assert a claim for punitive damages against Warren Newcomer and Newcomer Funeral Service Group, Inc ("NFSG") in the above-styled matter.

L LEGAL STANDARD FOR RULING ON A MOTION TO ASSERT A CLAIM FOR PUNITIVE DAMAGES UNDER [K.S.A. §60-3703](#).

Under [§60-3703](#), a trial court will allow a party to file an amended petition adding a claim for punitive damages if that party can establish that there is a probability that it will prevail on the punitive damage claim at trial. The Kansas Supreme Court has held that "probability" for the purposes of [§60-3703](#) means merely that it is "more likely than not". See [Fusaro v. First Family Mortgage Corporation, Inc.](#), 257 Kan. 794, 801, 897 P.2d 123, 129 (1995). In making such a determination, the trial court is required to "consider the evidence presented in the opposing affidavits as well as other evidence in a light most favorable to the party moving for the amendment, and if the evidence is of sufficient caliber and quality to allow a rational factfinder to find that the defendants acted towards the plaintiffs with willful conduct, wanton conduct, fraud, or malice, the trial court shall allow the amendment. See Fusaro, at id. An appellate court will give great deference to the determination of the trial court and it will utilize an **abuse** of discretion standard. See Fusaro, at 130.

For the reasons discussed below, after applying the standard announced by the Supreme Court in Fusaro, this Court should allow the plaintiffs to file an amended petition to assert a claim for punitive damages.

II. CLAIMS IN THIS CASE ALLOWING AN AWARD OF PUNITIVE DAMAGES.

A. Count II- Willful Interference with Plaintiffs' Right to the Cremated Remains of Ed Jr.

Kansas has long recognized an action in tort for interference with a dead body, or by extension, interference with cremated remains of a dead body. [Burgess v. Perdue](#), 239 Kan. 473, 480, 721 P.2d 239 (1986). Such interference must be intentional or malicious as opposed to negligent. Id. If the evidence shows that the defendant acted, willfully, wantonly, fraudulently, or maliciously then a punitive damage instruction may be given. P.I.K. 4th 171.44.

B. Count III - Violation of the Kansas Consumer Protection Act.

K.S.A. § 50-679 expressly provides for an award of punitive damages when the aggrieved consumer is “protected consumer” (elderly, disabled, or a veteran). See K.S.A. § 50-679. In this case, the evidence will show that Edwin Dana, Sr. was elderly, disabled, and a veteran and Doug Dana was disabled and a veteran and therefore both plaintiffs were protected consumers as defined by the KCPA. The same conduct, facts, transaction or series of transactions discussed below that supports the claims made in Count II, also supports the claim of a violation of the KCPA as alleged in Count III.

C. Count IV - Breach of Fiduciary Duty.

“Punitive damages ... are appropriate where a breach of fiduciary duty is involved.” *Oberhelman v. Barnes Investment Corp.*, 236 Kan. 335, 338, 690 P.2d 1343 (1984). A fiduciary relationship between the defendants and the plaintiffs in this case arose both out their written contract for cremation services and out of a special relationship between the parties.

A fiduciary relationship depends on the facts and circumstances of each individual case. See *Ford v. Guarantee Abstract & Title Co.*, 220 Kan. 244, Syl. P 4, 553 P.2d 254 (1976). Where there is confidence reposed on one side and resulting domination and influence on the other, the court may find a fiduciary relationship. *Denison State Bank v. Madeira*, 230 Kan. 684, 230 Kan. 815, 640 P.2d 135 (1982).

In this case the parties were in a fiduciary relationship because plaintiffs placed special trust and confidence in defendants to take custody of Edwin Jr's decomposed body, perform a cremation, and ship the ashes to Maine. Because the body of Edwin Jr. was badly decomposed, Doug Dana had no opportunity to shop around for a funeral home. (See Exhibit B, Aff. Doug Dana at ¶9). In addition to relying on the promise of defendants to properly handle the cremation, the plaintiffs relied on defendants' repeated promises to ship the ashes to Pleasant Point, ME in time for the wake and funeral. (See Exhibit B, Aff. Doug Dana at ¶7, 9; Exhibit A, Aff. Edwin Dana, Sr. at 18-10). The same conduct, facts, transaction or series of transactions that supports the claims made in Counts II and III, also supports the claim of a breach of fiduciary duty as alleged in Count IV.

HI. AFTER CONSIDERING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE PLAINTIFFS, IT IS MORE LIKELY THAN NOT THAT THE PLAINTIFFS WILL PREVAIL ON ONE OR MORE OF THEIR CLAIMS THAT PERMIT AN AWARD OF PUNITIVE DAMAGES.

As shown by the affidavits, deposition transcripts, and documents attached to these Suggestions, the evidence shows that defendants acted willfully or wantonly when they lost the ashes of Edwin Dana, Jr. and then told the grieving family that the ashes had been stolen.

A. Defendants lost the ashes of Edwin Dana Jr.

On August 12, 2010 Edwin Dana, Jr. died in Topeka, KS. The next day, his identical twin brother, Douglas Dana, contracted with Dove Funeral Home, through Richard Rausch, for a cremation of the body. The contract included the shipment of the ashes to Edwin Dana, Sr. in Pleasant Point, Maine. (See Exhibit B, Aff. Doug Dana at 17; Exhibit H, deposition of Richard Rausch at 29:3-14; also see Exhibit “2” and “3”, the Cremation Contract and Front Sheet attached to Aff. of Doug Dana). Rausch promised to send the ashes by Tuesday, August 17, 2010. (See Exhibit B, Aff. Doug Dana at 17; Exhibit A, Aff. Edwin Dana, Sr. at 18; Exhibit C, Witness Statement of Dale Miller). The actual cremation was performed by Shared Mortuary Services (“SMS”), which is also called Shawnee County Crematory, a division of Newcomer Funeral Service Group (“NFSG”).

After the cremation of Edwin Jr's body the defendants mislabeled the urn containing the ashes of Edwin Jr. and lost track of the ashes. (See Exhibit J, deposition of Lary Dodge at 135:21-25; Exhibit D, Dunnichay Email). Jay Luehring performed the

cremation of Edwin Jr's body and was the person responsible for the wrong labels being put on the urn and storage locker. (See Exhibit J, deposition of Lary Dodge at 137:17-19). Defendants knew by late afternoon on August 18, 2010 that the Dana ashes were lost. (See Exhibit J, deposition of Lary Dodge at 98:14 to 100:10). The defendants claim to have conducted a thorough search, but the ashes could not be found.

B. Defendants covered up their mistake by telling plaintiffs that the ashes had been stolen.

Although defendants knew by Wednesday, August 18th that the ashes could not be found, they did not inform the plaintiffs until Saturday, August 21st. After concealment was no longer an option because of the repeated inquiries from the plaintiffs and because the wake to begin on Tuesday, August 24th, the defendants finally told the plaintiffs that they could not find the ashes. The Senior Vice President, Jed Dunnichay, called Edwin Sr. at his home in Pleasant Point, ME and told him the ashes were gone. (See Exhibit N, deposition of Jed Dunnichay at 18:23 to 19:14). Edwin Sr. called his son Doug in Topeka who immediately drove over to Dove Funeral Home. Despite no evidence to indicate a theft, defendants blamed the loss of the ashes on an unknown thief saying the crematory had been broken into and only the urn containing the ashes of Edwin Jr. was taken. (See Exhibit S, deposition of Doug Dana at 80:25 to 81:24; 82:11-19; Exhibit R, deposition of Edwin Dana, Sr. at 81:21 to 82:7; Exhibit I, deposition of Daniel Werner at 11:9 to 12:1). Defendants claimed that the cremation file and the label off of the storage locker were stolen too. (See Exhibit K, deposition of Warren Newcomer at 66:5 to 67:15).

Plaintiffs challenged defendants' story of a theft and asked why the police had not been called if they believed that a crime had been committed. (See Exhibit R, deposition of Edwin Dana, Sr. at 60:14 to 61:8; Exhibit S, deposition of Doug Dana at 82:20 to 83:8). Defendants claimed that they had not called the police because they were doing their own internal investigation. (See Exhibit S, deposition of Doug Dana at 82:20-24). Even though they did not believe a theft had occurred, defendants went as far as filing a theft report with the Topeka Police Department. (See Exhibit N, deposition of Jed Dunnichay at 31:25 to 32:9; Exhibit E, TPD police report). Dunnichay testified at his deposition that he didn't believe a theft had occurred when the police report was filed:

Q. Had Mr. Dana, Sr., by your testimony, not informed you that the police should be called, would you have called the police?

A. Yes.

Q. Why?

A. Well, we had property missing. Simple fact was that. It's -

Q. Okay. Even though you didn't believe that they were stolen at the time?

A. Correct.

(See Exhibit N, deposition of Jed Dunnichay at 31:25 - 32:9). Defendants backed up their theft story by claiming that they had "elaborate security measures" and that they had "exhausted all avenues" in their search for the ashes. (See Exhibit S, deposition of Doug Dana at 98:9-25; Exhibit R, deposition of Edwin Dana, Sr. at 60:14-23).

On August 23, 2010, Warren Newcomer ("Newcomer"), the owner of NFSG, endorsed the theft story cover up by sending a letter to Edwin Sr. saying:

"We have concluded that the breaching of all of our safeguards and security procedures must implicate a criminal act and have asked the local police to investigate."

(See Exhibit F, Newcomer Letter). Newcomer acknowledged that he intended Edwin Sr. to believe his statement when he wrote the letter. (See Exhibit K, deposition of Warren Newcomer at 79:5-13). Prior to the preparation of the letter by Newcomer, the Topeka Police Department concluded that no theft had occurred and informed Jed Dunnichay. (See Exhibit N, deposition of Jed Dunnichay at 94:18 to 95:24). Not only did the TPD conclude there was no theft, the employees and officers of NFSG who searched for the ashes prior to Newcomer's letter being written, did not believe a theft had occurred. Jay Luehring who performed the cremation and mixed up the labels testified:

Q. Okay. At any time did you believe that those remains had been stolen?

A. Opinion?

Q. Yeah.

A. No, I did not believe that they were -- that they were stolen. I don't believe any of our people would be capable of doing that.

(See Exhibit L, deposition of Jay Luehring at 90:11-17). Richard Rausch who was the funeral director that dealt directly with the plaintiffs testified:

Q. Mr. Rausch, did you ever believe that the remains of Edwin Dana, Jr., had been stolen?

A. No, sir.

Q. You never believed that?

A. No, sir.

(See Exhibit H, deposition of Richard Rausch at 98:3-7). Lary Dodge, the director of SMS and the direct supervisor of Luehring testified:

Q. (By Mr. Hentzen) Mr. Dodge, did you ever form a belief that the remains of Edwin Dana, Jr., had been stolen?

A. No.

(See Exhibit J, deposition of Lary Dodge at 124:8-11). Robert Webb, who talked with both of the plaintiffs on August 20th after he knew the ashes were gone, but did not disclose this to the plaintiffs, testified:

Q. Did you ever think that those remains were stolen?

A. The thought crossed my mind, but I don't think I ever thought -- I couldn't imagine anybody in our business doing such a thing, so, no.

(See Exhibit M, deposition of Robert Webb at 29:21 - 30:1). Jed Dunnichay who directly oversaw the search for the ashes testified:

Q. Did you think they were stolen?

A. At the time, no, but it was certainly an avenue that had not been explored.

Q. Was there any evidence of a break-in?

A. No.

Q. Did you suspect any of your own employees to have taken the remains?

A. No.

(See Exhibit N, deposition of Jed Dunnichay at 31:11-18). Defendants acknowledge that there was no evidence of a break-in or evidence of a theft. (See Exhibit J, deposition of Lary Dodge at 126:9-23; Exhibit N deposition of Jed Dunnichay 31:14-15).

Despite the belief of the employees and officers of NFSG that the ashes were not stolen, and despite the Topeka Police Department's conclusion that the ashes were not stolen, and despite there being absolutely no evidence of a break-in or of any tampering with the storage lockers, Newcomer, in an effort to deflect blame from his company, told a grieving father and brother that "*we have concluded*" that the ashes were stolen. Newcomer acknowledged that he didn't even ask his own people nor did he ask the Topeka Police Department whether there was any evidence of a theft before he came to his purported conclusion. (See Exhibit K, deposition of Warren Newcomer at 74:14 to 76:4; 83:2 to 85:11). Newcomer was so intent on deflecting blame that he didn't consider any other explanation for how the ashes went missing. Newcomer testified:

Q. Did you, when you wrote this letter, consider any other explanation to the Danas other than saying he's been stolen?

A. No.

Q. Did you consider saying, "We took his body into our custody, performed the cremation, it was in our sphere, it was our responsibility, we messed up, sorry"? Did you consider just saying that?

A. No.

(See Exhibit K, deposition of Warren Newcomer at 92:3-12).

As the person primarily responsible for the theft story cover up, and under the standard set forth in *Fusaro*, there exists a probability that the plaintiffs will prevail on one or more of their claims in Counts II through IV and demonstrate that Warren Newcomer acted willfully or wantonly in telling plaintiffs that the ashes of Ed Jr. had been stolen when he had no reasonable belief that such statement was true.

C. Defendants recind their theft story and claim they found the ashes in the storage lockers.

Ten days after telling the plaintiffs that a thief was to blame, the defendants called Edwin Sr. and claimed they found the ashes. (See Exhibit D Dunnichay email). Defendants acknowledge that no theft ever occurred and it was a labeling error by the employee who performed the cremation that resulted in the ashes being lost. (See Exhibit K, deposition of Warren Newcomer at 86:13-23).

By this time the plaintiffs had been told on the one hand, that all avenues of search had been exhausted and the ashes were stolen, and then on the other hand, that the ashes had magically been found. Given the inconsistency of defendants' explanations, together with their failure to immediately involve the police when they claimed to have suspected a criminal act, and the delay in telling the plaintiffs that the ashes of Ed Jr. were lost, neither Edwin Sr. nor Doug believed that defendants really found the ashes of Ed Jr. (See Exhibit R, deposition of Edwin Dana, Sr. at 69:3-8; 90:12-25; Exhibit B, Aff. of Doug Dana at ¶22).

IV. THE COVER UP, DELAY, AND THE DEFENDANTS' CONDUCT THAT RESULTED IN THE ASHES BEING LOST IN THE FIRST PLACE ARE INEXTRICABLY LINKED AS PART OF THE SAME TRANSACTION OR SERIES OF TRANSACTIONS THAT ARE RELATED IN TIME, SPACE, ORIGIN, AND MOTIVATION.

The theft story cover up, the delay, and the conduct of the defendants that resulted in the ashes being lost in the first place are inextricably linked as part of the same transaction or series of transactions that are related in time, space, origin, and motivation.

See *Stanfield v. Osborne Industries, Inc.*, 263 Kan. 388, 401, 949 P.2d 602, 611 (Kan. 1997).¹ In his deposition, Doug Dana was unable to separate the grief that would be normally associated with loss of a loved one, and the emotional distress he suffered as a result of defendants' conduct. He testified:

Q. Are the -- do you contribute -- attribute these solely to the fact of your brother's remains being lost for a period of a couple of weeks or to his death as well, just the fact that he's gone?

A. I think it's I think it's -- I think it's everything. I think the deceit, the coverup, everything. You know, the way that it was handled, the way -- the way -- the seeing him in a garage, there's no Christ candle, that there's -- there's -- mean, I don't think people would understand how much pain that is.

(See Exhibit S, deposition of Doug Dana at 120:12-23).

Although defendants could have been honest and simply told the plaintiffs right away that the ashes were lost so that the date for the wake and funeral could be changed, defendants deliberately delayed doing so until one business day before the wake started. The delay forced the plaintiffs into a devil's bargain where if they cancelled the ceremonies they would suffer embarrassment, humiliation, and shame in their Native American community, and if they went ahead with a the ceremonies they would be forced to suffer emotional distress knowing that the ceremony was a sham. Doug Dana testified how hard it was to watch tribal **elders** on their knees blessing an urn that Doug knew was empty. (See Exhibit S, deposition of Doug Dana at 98:14-25). Plaintiffs were unable to complete the Passamaquoddy ritual called "gausegwencin" because the ashes were not there. (See Exhibit V, deposition of Linda Dana at 34:8-20). The gausegwencin has to do with allowing the spirit to move on. *Id.* Plaintiffs still do not know whether the ashes sent to them are really the ashes of their loved one. (See Exhibit R, deposition of Edwin Dana, Sr. at 69:3-8; 90:12-25; Exhibit B, Aff. of Doug Dana at 122).

Although defendants may have been arguably negligent when they lost the ashes, the evidence shows that their conduct was intentional, willful and wanton when they engaged in the delay and the cover up. Obviously, if the ashes hadn't been lost there would have been no need for a cover up. The conduct of the defendants was part of one event, transaction or series of transactions and therefore the intentional, willful and wanton conduct of the defendants supports a claim of punitive damages under the Fusaro standard.

V. DEFENDANTS DELIBERATELY CONCEALED THE LOSS OF THE ASHES UNTIL AUGUST 21ST WHILE KNOWING THAT PLAINTIFFS HAD A WAKE SCHEDULED TO START ON AUGUST 24TH.

A. Knowing that a wake and funeral were scheduled defendants did not disclose to plaintiffs that the ashes were lost until August 21st.

The evidence shows that defendants, including Richard Rausch, knew or had reason to know, at least by August 16, 2010, that a wake and funeral were scheduled for August 24th - 26th. As the person who oversaw all of the Penwell-Gabel locations in Topeka, Rausch was directly responsible for Dove Funeral Home, Penwell-Gabel Midtown Funeral Home and SMS. (See Exhibit H, deposition of Richard Rausch at 6:13 to 7:1; 10:5-9). Rausch's knowledge is imputed to the NFSG as he was an officer in a managerial capacity. See *Supreme Petroleum, Inc. v. Briggs*, 199 Kan. 669, 675, 433 P.2d 373 (1967).

On August 16, 2010, Edwin Sr. called Dove Funeral home to speak with Richard Rausch. (See Exhibit A, Aff. Edwin Dana, Sr. at ¶ 11; Exhibit G Phone Records). Edwin Sr. called because when Rausch originally talked with him he had promised to ship the ashes of Edwin Jr. out by August 17th. (See Exhibit R, deposition of Edwin Dana, Sr. at 28:9-13). Edwin Sr. wanted to make sure that the ashes would in fact be sent when promised because, relying on Rausch's promise, Edwin Sr. and his wife, Linda, had already made arrangements for a wake and a funeral with Native American rituals and military honors at the Passamaquoddy reservation in Pleasant Point, Maine. (See Exhibit A, Aff. Edwin Dana, Sr. at ¶10). He talked with Sr. Janice Murphy to make arrangements for the funeral Mass. (See Exhibit O, deposition of Sr. Murphy at 6:24 to 7:14). He was headed the next day to meet with Dorothy Barnes at the Tribal Office to make arrangements for the wake and the internment of the ashes on the Reservation. (See Exhibit P, deposition of Dorothy Barnes at 4:17-23). He also talked with Richard Mealy to make arrangements for military honors at the funeral. (See Exhibit Q, deposition of Richard Mealy at 4:23 to 5:25).

Edwin Sr. was informed that Rausch was not there at Dove but could be reached at Penwell-Gabel Midtown and was given the phone number to call - 785-354-8558. Edwin Sr. immediately called over to Penwell-Gabel Midtown. (See Exhibit A, Aff. Edwin Dana, Sr. at ¶11; Exhibit G Phone Records). On this call Edwin Sr. told a person who identified himself as "John" that the wake was to start on August 24th and then be followed by the funeral and the internment on the Passamaquoddy reservation so he wanted to make sure the ashes would be sent in time. (See Exhibit A, Aff. Edwin Dana, Sr. at ¶12). John assured Edwin Sr. that he would pass the information on to Rausch. (See Exhibit A, Aff. Edwin Dana, Sr. at 112).

Jed Dunnichay also testified that Rausch knew when the wake and funeral were to take place. Dunnichay testified:

Q. During the time of discovery that the remains were actually missing on the 18th and the time of discovery, were you aware of any funeral arrangements or memorial services that were being conducted regarding Mr. Dana?

A. Yes.

Q. Okay. And what was your understanding of those?

A. I think they were going to have a ceremony in Maine the following week. When I say "following," the week of the -- I think it would be the -- what? -- the 23rd. And -and I'm not certain, but I think it was on that Tuesday --

Q. Were you --

A. -- I think.

Q. Were you aware of their desire to have -- whether or not they had a desire to have the remains present?

A. I was made aware of that on Friday.

Q. Friday -- the date?

A. That would be the 20th.

Q. Do you know if anybody else was aware of the arrangements in Maine?

A. Yes.

Q. Who was aware?

A. Richard Rausch.

Q. What was his understanding? Do you know?

A. That there was going to be a memorial ceremony in Maine on Tuesday.

(See Exhibit N, deposition of Jed Dunnichay 96:4 to 97:8).

Other than the cremation itself the only other thing that mattered to the Danas was when the ashes would arrive in Maine so that they could hold a Passamaquoddy wake and funeral. (See Exhibit B, Aff. Doug Dana at 18; Exhibit A, Aff. Edwin Dana at 116, 8). The Dana family members are all members of the Passamaquoddy Tribe. (See Exhibit A, Aff. Edwin Dana, Sr. at ¶6). Receipt of the ashes of Ed Jr. was a material matter for Ed and Doug, both for emotional and family reasons, but also in connection with their Native American beliefs. (See Exhibit A, Aff. Edwin Dana, Sr. at ¶12; Exhibit B, Aff. of Doug Dana at 18).

In deposition Rausch acknowledged that company policy required him to make arrangements for the disposition of the ashes at the time he executed the cremation contract. However, Rausch denied that he ever knew when the wake and funeral were scheduled and that it was left open ended as to when the ashes were to be shipped. (See Exhibit H, deposition of Richard Rausch at 82:3 to 83:25). Considering the foregoing evidence, in a light most favorable to the plaintiffs under the Fusaro standard, it is more likely than not that a jury would conclude that Rausch knew when the funeral was scheduled and as a senior officer his knowledge was imputed to the corporation.

B. Knowing that that the ashes were lost Robert Webb deliberately concealed the loss of the ashes from plaintiffs when he spoke with both of them on August 20, 2010.

Robert Webb admitted that he spoke with both Edwin Sr. and Doug Dana on August 20th. (See Exhibit M, deposition of Robert Webb 13:25 to 15:4; 27:16-19; Exhibit U, Dove Note Card). He knew that ashes were lost but concealed that knowledge from both plaintiffs. Webb testified about his conversation with Edwin Sr.:

Q. And on what date was it that you found out that the remains were unable to be located?

A. Probably on -- I think Thursday.

Q. Okay. So it was the day -- it was the 19th; is that right?

A. That would be -- yeah. If that is the date, yes.

Q. Was -- so it was before the father called; is that correct?

A. Yes.

Q. Did you inform Mr. Edwin Dana, Sr., that the remains were unable to be located?

A. No.

(See Exhibit M, deposition of Robert Webb 28:11-23). Webb testified about his conversation with Doug Dana:

Q. Did -- when Doug came in that day, you were aware that the remains were unable to be located; is that correct?

A. Probably. Yes.

Q. Did you speak with Mr. Doug Dana regarding that?

A. No.

(See Exhibit M, deposition of Robert Webb 29:5-11). Even if Webb held out the hope that the ashes would be found in time for the funeral, the fact remains that he talked directly with both plaintiffs, while knowing that the ashes were lost, and did not tell them. Webb's concealment of the loss of the ashes was ratified by the corporation. See section below.

VI. NFSG IS LIABLE FOR PUNITIVE DAMAGES BECAUSE THE KNOWLEDGE OF ITS OWNER AND OFFICERS IS IMPUTED TO THE COMPANY AND THE OWNER OF THE COMPANY RATIFIED THE CONDUCT OF HIMSELF AND EACH OFFICER.

A. Legal standard for allowing punitive damages against an employer.

Under 60-3702(d)(1), punitive damages can only be assessed against an employer if the employee's questioned conduct was authorized or ratified by the employer. Citing the [Restatement \(Second\) of Torts § 909 \(1977\)](#) the Kansas Supreme Court stated:

“A corporation is not liable for punitive damages for an employee's tortious acts committed within the scope of his employment unless (a) the corporation or its managerial agent authorized the doing and manner of the act; (b) the employee was unfit and the corporation or its managerial agent was reckless in employing or retaining him; (c) the employee was employed in a managerial capacity and was acting in the scope of employment; or (d) the corporation or its managerial agent ratified or approved the act of the employee.”

[Kline v. Multi-Media Cablevision, Inc., 233 Kan. 988, 990, 666 P.2d 711, 714 \(Kan. 1983\)](#). As held by the Kansas Supreme Court, however, the meanings of the terms “authorized” and “ratified” under 60-3702(d)(1) are extremely broad, and an employer's authorization or ratification can be either express or implied. In [Smith v. Printup, 254 Kan. 315, 866 P.2d 985 \(Kan. 1993\)](#), the Supreme Court announced the following legal standard:

Based upon the dictionary definitions, Kansas case law, and the law of other jurisdictions, we hold that authorization under the provisions of [K.S.A. 1992 Supp. 60-3701\(d\)\(1\)](#) may be either express or implied and generally is accomplished before or during the employee's questioned conduct. It may be based on an express grant of authority or on a course of conduct indicating that the employee was empowered or given the right or authority to engage in the questioned conduct. Ratification under the provisions of 60-3701(d)(1) may be either express or implied and may be accomplished before, during or after the employee's questioned conduct. It may be based on an express ratification or based on a course of conduct indicating the approval, sanctioning, or confirmation of the questioned conduct.

[254 Kan. at 342; 866 P.2d at 1003](#). In this case the president and owner of NFSG ratified the action of each of the employees involved with the Dana matter.

B. The conduct of each officer was expressly ratified by the president of NFSG.

As the president and majority owner of NFSG, Newcomer is deemed to have ratified his own acts. (See Exhibit K, deposition of Warren Newcomer 5:12-22). As president of NFSG he also expressly ratified the acts of Rausch, Dunnichay, Werner, and Webb. In his deposition taken on April 15, 2011, Newcomer admitted that Rausch, Dunnichay, Werner, and Webb were employees of NFSG. (See Exhibit K, deposition of Warren Newcomer 10:14 to 11:2). Newcomer expressly ratified the acts of Rausch

having to do with the Dana cremation and the search for the remains, and his contact with the Dana family. (See Exhibit K, deposition of Warren Newcomer 14:24 to 15:22). Newcomer likewise expressly ratified the acts of Jed Dunnichay (See Exhibit K, deposition of Warren Newcomer 15:23 to 17:21); and Daniel Werner (See Exhibit K, deposition of Warren Newcomer 17:22 to 22:2). In addition to the deposition testimony of Warren Newcomer, defendants filed an Answer in the action wherein the company defendant admitted that it was responsible for the acts of each of the individual defendants who were acting within the course and scope of their employment or agency. (See Answer to Petition at ¶¶ 53, 64, 75).

VII. PUNITIVE DAMAGES ARE PARTICULARLY APPROPRIATE IN THIS CASE.

In light of the factors in [K.S.A. § 60-3701\(b\)](#) that this Court may consider when determining the amount of punitive damages to be awarded, it is apparent that a punitive damage award would be appropriate in this case. Of particular note are the following factors:

- (1) the likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;
- (2) the degree of the defendant's awareness of that likelihood;
- (4) the duration of the misconduct and any intentional concealment of the it;
- (5) the attitude and conduct of the defendant upon discovery of the misconduct.

[K.S.A. § 60-3701\(b\)](#).

With regard to factors (1) and (2), the evidence shows that it is more likely than not that defendants knew that a wake and funeral had been scheduled and they knew that plaintiffs wanted to have the ashes there. Defendants also knew that Native American rituals and military honors were to be incorporated into the wake and funeral. If defendants would have told the plaintiffs right away that the ashes were lost, the plaintiffs may have been able to avoid the sham wake and funeral that they were forced to endure. If the defendants had not lied to the plaintiffs and told them that a thief had made off with the ashes, the plaintiffs would have been spared additional anguish brought on by the cover up and not knowing whether the defendants were telling the truth when they said the ashes were stolen and gone forever or were telling the truth when they said the ashes were found.

With regards to factor (4) and (5), the evidence is that Robert Webb spoke with both Edwin Sr. and Doug Dana on August 20th, when he already knew the ashes were missing, but concealed this from the plaintiffs. Webb even talked with Rausch with Doug standing there and neither person revealed that the ashes were gone. (See Exhibit S, deposition of Doug Dana at 152:3 to 155:13). Also, as the facts uncovered during discovery show, Rausch knew that a wake and funeral was scheduled but he persists in denying this obvious fact in an effort to dodge responsibility for his part in the cover up.² Finally, when push came to shove and concealment of the loss of the ashes was no longer an option, defendants willfully and wantonly sought to dodge responsibility by blaming the loss of the ashes on an unknown thief. In light of the testimony of the defendants that no one actually believed that a theft had occurred, the theft story, as a cover up, was particularly deceitful.

CONCLUSION

WHEREFORE, for all the above reasons, plaintiffs respectfully request that this Court enter its Order allowing the plaintiffs to amend their Petition and assert a claim for punitive damages in this action against Warren Newcomer and Newcomer Funeral Service Group, Inc.

Footnotes

- 1 The Stanfield case dealt with claim preclusion but its description of what constitutes a single claim is germane to this case. “In general, [claim] connotes a natural grouping or common nucleus of operative facts. Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes.” 949 P.2d at 611.
- 2 There is evidence of efforts extending into discovery in this case to cover up Rausch's knowledge of the wake and funeral. Exhibit T attached hereto, Bates # D00052, was produced to plaintiffs in response to their opening requests for documents. Later, in response to plaintiff's request to view original records it was discovered that Exhibit T that was produced earlier omitted an incriminating statement that information about the funeral was “passed on to Richard.” See Exhibit U attached hereto. Robert Webb testified that he authored Exhibit U and that he did pass the information on to Richard. (See Exhibit M, deposition of Robert Webb at 14: to 17:11). Rausch denied that he was informed of such by Webb. (See Exhibit H, deposition of Richard Rausch at 134:1 to 135:25). Defendants offered no explanation for the discrepancies between the documents.

End of Document

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